

FILED

NOV 13 1944

CHARLES ELMORE DROPLEY  
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

\_\_\_\_\_ 323 US # 10  
COH-COM  
**No. 669**  
\_\_\_\_\_

JOSEPH COHEN,

*Petitioner,*

*vs.*

THE UNITED STATES OF AMERICA

\_\_\_\_\_

**PETITION FOR WRIT OF CERTIORARI TO THE  
UNITED STATES CIRCUIT COURT OF APPEALS  
FOR THE SECOND CIRCUIT AND BRIEF IN SUP-  
PORT THEREOF**

\_\_\_\_\_

WALTER BROWER,  
*Counsel for Petitioner.*

2/21/46  
ILO ORLEANS,  
COLEMAN GANGEL,  
*Of Counsel.*

144343



## INDEX TO PETITION

	Page
I. Opinion of the court below .....	2
Date of judgment below and of denial of re- hearing .....	2
II. Jurisdiction .....	2
III. Statutes involved .....	2
IV. Summary statement of matter involved .....	3
Mass prosecution .....	3
The indictment .....	3
The trial .....	4
Some basic errors at the trial .....	6
The conviction and sentence .....	7
V. The questions presented .....	8
VI. Reasons for allowance of writ .....	13
VII. Conclusion .....	19

## INDEX TO BRIEF

I. Preliminary remarks .....	21
II. Opinion of the court below .....	23
III. Jurisdiction .....	24
Date of entry of judgment and denial of petition for a rehearing .....	24
IV. Statement of the case .....	24
V. Specification of assigned errors to be urged .....	24
VI. Argument .....	26
Point I. The appellant Cohen by this mass prosecution, was denied his constitutional right to a fair and impartial trial .....	27
Point II. A mass prosecution of non-related conspiracies, with a misjoinder of defendants and of offenses, cannot be justified under the doctrine of <i>Berger v. U. S.</i> , 295 U. S. 78. The variance in the instant case was clearly material, and reversal is mandatory because of the obvious practical prejudice to the accused .....	34

	Page
Point III. The Court of Appeals erred in ruling (concededly <i>contra</i> to the great weight of authority) that the Statute of Limitations is not a bar to a conspiracy in which the last overt act found was more than the statutory period prior to the indictment. . . . .	36
Point IV. The Court of Appeals erred in ruling that Section 557 of Title 18, U. S. Code, permits the joinder of crimes when the accused are different, a view which is concededly contrary to that adopted in the Eighth Circuit and with regard to which there has been dissent in the Second and Seventh Circuits. . . . .	40
Point V. The Circuit Court of Appeals erred in holding (concededly contrary to a body of substantial authority), that appellate review need be no more exacting in criminal than in civil cases. . . . .	42
Point VI. In ruling that since, as a practical alternative, persons charged with conspiracy must either be subjected to a joint prosecution and the danger of an unfair trial, or, on the other hand, obtain immunity, and that therefore the accused must accept that risk, the Second Circuit expresses a doctrine which is violative of the Constitutional guarantee of a fair and impartial trial. . . . .	43
Point VII. The Court of Appeals erred in approving the ruling of the trial judge rejecting <i>in toto</i> all requests to charge, though they correctly stated principles applicable to crucial phases of the trial, and not embraced in the main charge. In adopting this policy (concededly <i>contra</i> to that applied in other jurisdictions), the court below expressed a doctrine which paves the way for a precarious curtailment of the rights of an accused. . . . .	45
Point VIII. Since the Second Circuit does not apply the "harmless error doctrine" in con-	

formity with the Supreme Court Rule in the <i>McCandless v. U. S.</i> , 298 U. S. 342 and in the 5th, 7th, 8th, 9th and 10th Circuits, the substantial prejudicial errors in this record, singly and in the aggregate, were not accorded proper analysis and appraisal as demanded by law.....	47
Point IX. The Court of Appeals erred in failing to hold as reversible error, as to appellant Cohen, the receipt in evidence, and the reading verbatim to the jury, of the legal opinion of the Circuit Court of Appeals (10th Cir.) in the wholly unrelated mail fraud trail respecting the conviction therein of the co-defendant, Joel Rosenberg, for a similar type of mail fraud, and which was reversed on appeal. ( <i>Rosenberg v. U. S.</i> (10th Cir.) 120 F. (2) 935).....	53
Point X. The Circuit Court of Appeals erred in holding as non-reversible error the mode of interrogation, adopted by the prosecutor in cross examination of appellant, by which he imputed, by the affirmations in his questions, criminal convictions to the employees of the appellant (which the court below conceded to be "improper") and the commendation by the trial judge of said interrogation, after the court had previously taken an antithetical attitude toward similarly phrased questions, asked by appellant's attorney.....	54
Point XI. There was fundamental reversible error by the trial court in excluding the defendants and their counsel, over their objection, from the hearing of their motion to inspect certain papers in the government's possession and, in violation of the Constitutional rights of the accused, permitting argument on that subject by the prosecutor in private, <i>ex parte</i> .....	57

Point XII. The conviction of appellant on Count I, based merely on the uncertain, self-contradictory opinion of a witness, as to mailing in the Southern District of New York, (there being no envelope) was erroneous because of inadequate evidence as a matter of law. The lack of proof was jurisdictionally fatal since proof beyond a reasonable doubt as to the mailing in the district was the <i>sine qua non</i> for a verdict of guilt...	60
Point XIII. The Court of Appeals erred in failing to determine as reversible, the following errors of the trial court (which were urged as substantial in the court below, but which were not discussed in the opinion).....	62
(a) in deliberately receiving hearsay, as proper evidence, and ruling that the truthfulness of conversations contained therein, was for the jury to determine.....	62
(b) in receiving in evidence, as binding on all other defendants, every statement or act of an alleged conspirator, irrespective of whether it was in furtherance of the conspiracy, and without independent competent evidence of the connection of the other defendants with the scheme.....	62
(c) in permitting in evidence the declarations of one conspirator to another, as competent evidence to establish the connection of a third person (the appellant Cohen) with the conspiracy.....	63
(d) in restricting and destroying the value of cross examination of government witnesses as to their prior testimony, by requiring (1) reference to the stenographic transcript, and (2) confronting the witness beforehand with the testimony already given; and.....	63
(e) in admitting evidence as to facts occurring subsequent to the date of the indictment, for three years and three months thereafter, and up to January 1, 1942.....	63

VII. Conclusion . . . . .	Page 63
Appendix A--Opinion of the U. S. Circuit Court of Appeals . . . . .	65

## TABLE OF CASES CITED

<i>Amendola v. U. S.</i> , 17 F. (2) 529 (2nd Cir.) . . . . .	13
<i>Baush Machine Tool Co. v. Aluminum Co. of Am.</i> , 79 F. (2) 217 (2nd Cir.) . . . . .	54
<i>Berger v. U. S.</i> , 295 U. S. 78 . . . . . 9, 11, 17, 22, 25, 34, 56, 64	
<i>Brown v. U. S.</i> , 298 F. 428 (2nd Cir.) . . . . .	54
<i>Brown v. Elliott</i> , 225 U. S. 392 . . . . .	15, 39
<i>Bruno v. U. S.</i> , 308 U. S. 287 . . . . .	16, 46, 48
<i>Coco v. U. S.</i> , 289 F. 33 (8th Cir.) . . . . .	15, 36
<i>Culp v. U. S.</i> , 131 F. (2) 93 (8th Cir.) . . . . .	15
<i>Egan v. U. S.</i> , 287 F. 958 (C. A. D. C.) . . . . .	46
<i>Falcone v. U. S.</i> , 109 F. (2) 579 (2nd Cir.) . . . . .	33
<i>Farris v. Interstate Circuit Inc.</i> , 116 F. (2) 409 (5th Cir.) . . . . .	49
<i>Fillipoon v. Albion</i> , 250 U. S. 76 . . . . .	52
<i>Fort Dodge Hotel v. Bartelt</i> , 119 F. (2) 253 (8th Cir.) . . . . .	49
<i>Feinberg v. U. S.</i> , 140 F. (2) 592 (2nd Cir.) . . . . .	16, 42
<i>Hedderly v. U. S.</i> , 193 F. 561 (9th Cir.) . . . . .	15
<i>Jones v. U. S.</i> , 162 Fed. 417 (9th Cir.) . . . . .	15
<i>Keller v. Brooklyn Bus Corp.</i> , 128 F. (2) 510 (2nd Cir.) . . . . .	48
Dissenting opinion by Jerome Frank, J. at p. 513 . . . . .	51
<i>Kissel v. U. S.</i> , 218 U. S. 601 . . . . .	15, 39
<i>Little v. U. S.</i> , 73 F. (2) 861 (10th Cir.) . . . . .	49, 50, 59
<i>Lonabaugh v. U. S.</i> , 179 F. 476 (8th Cir.) . . . . .	15, 39
<i>Lorenz v. U. S.</i> , 24 App. D. C. 337 . . . . .	15
<i>Lynch v. Oregon Lumber Co.</i> , 108 F. (2) 283, (9th Cir.) . . . . .	49
<i>Mackett v. U. S.</i> , 90 F. (2) 462 (7th Cir.) . . . . .	62
<i>McCandless v. U. S.</i> , 298 U. S. 342 . . . . .	17, 48, 52
<i>McElroy v. U. S.</i> , 164 U. S. 76 . . . . .	14, 36, 41
<i>McWhorter v. U. S.</i> , 299 F. 780 (8th Cir.) . . . . .	15
<i>Marcante v. U. S.</i> , 49 F. (2) 156 (10th Cir.) . . . . .	32
<i>Press Pub. Co., v. McDonald</i> , 63 F. 238 (2nd Cir.) . . . . .	54
<i>Rosenberg v. U. S.</i> , 120 F. (2) 935 (10th Cir.) . . . . . 9, 18, 25, 53	
<i>Snyder v. Mass.</i> , 291 U. S. 97 . . . . .	58
<i>Thorwegan v. King</i> , 111 U. S. 549 . . . . .	16, 46
<i>U. S. v. Ames</i> , 39 F. Supp. 885 . . . . .	5

	Page
<i>U. S. v. Andolschek</i> , 142 F. (2) 503 (2nd Cir.)	16, 42
<i>U. S. v. Baker</i> , 50 F. (2) 122 (2nd Cir.)	62
<i>U. S. v. Hans Max Haupt</i> , 136 F. (2) 661 (7th Cir.)	29
<i>U. S. v. Liss</i> , 137 F. (2) 995 (2nd Cir.) Dissenting opinion by Jerome Frank, J. at p. 1001.	16, 22, 23, 33, 34, 48, 51
<i>U. S. Mitchell</i> , 322, U. S. 65	17
<i>U. S. v. Nettl</i> , 121 F. (2) 927 (3rd Cir.)	56
<i>U. S. v. Siebricht</i> , 59 F. (2) 976 (2nd Cir.)	36
<i>U. S. v. Twentieth Century Bus Oper.</i> , 101 F. (2) 700 (2nd Cir.)	14
<i>U. S. v. Tuffanelli</i> , 131 F. (2) 890 (7th Cir.) Dissenting opinion by Major, J. at p. 894	14, 41
<i>Ventimiglio v. U. S.</i> , 61 F. (2) 619 (6th Cir.)	36
<i>Ware v. U. S.</i> , 154 F. 577 (8th Cir.)	15
<i>Wilson v. U. S.</i> , 109 F. (2) 895 (6th Cir.)	36
<i>Worcester v. Pure Torpedo Co.</i> , 127 F. (2) 945 (7th Cir.)	49

## OTHER AUTHORITIES CITED

United States Code, Title 18	2
Section 557	12, 14, 25
Section 88	1, 2
Section 338	2
Rule, following Section 688 (292 U. S. 661, 666)	2
United States Code, Title 28	2, 24
Section 347 (a)	2, 24
Rules of Practice and Procedure in Criminal Cases	
Rule XI	2, 24
Wigmore §980, Subdiv. 5	56

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

---

**No. 669**

---

JOSEPH COHEN,

*Petitioner,*

*vs.*

THE UNITED STATES OF AMERICA

---

**PETITION FOR WRIT OF CERTIORARI TO THE  
UNITED STATES CIRCUIT COURT OF APPEALS  
FOR THE SECOND CIRCUIT**

---

*To the Honorable Harlan F. Stone, Chief Justice and the  
Associated Justices of the Supreme Court of the United  
States:*

The petitioner, Joseph Cohen, prays that a writ of *certiorari* issue to review the judgment of the United States Circuit Court of Appeals for the Second Circuit, dated October 18, 1944, to the extent that it affirms the judgment of the United States District Court for the Southern District of New York, convicting petitioner of violating the mail fraud and conspiracy statutes (Title 18 U. S. C. Sec. 338: Title 18 U. S. C. Sec. 88).

## I

**Opinion of the Court Below**

The opinion of the Circuit Court of Appeals, Second Circuit, rendered by Learned Hand, J., is not yet officially reported; but a printed copy is annexed to the record, certified to the Supreme Court. There was no opinion in the District Court. A copy of the opinion of the Court of Appeals is annexed as Appendix A.

**Date of Judgment Below and of Denial of Rehearing**

The judgment of the Circuit Court of Appeals sought to be reviewed was entered on October 18, 1944. Petition for rehearing was denied on October 10th, 1944. Issuance of mandate was stayed by order of the court below, pending application to this Court for a Writ of *Certiorari*.

## II

**Judisdiction**

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925 (U. S. C. Title 28, Sec. 347 a), and Rule XI of the Rules of Practice and Procedure in Criminal Cases, promulgated by this Court on May 7, 1934. (18 U. S. C. A. following Sec. 688), 292 U. S. 661, 666.

## III

**Statutes Involved**

The following statutes are involved:

1. Criminal Code Sec. 215, which sets forth as a crime the use of the U. S. mails in a scheme to defraud. *U. S. Code Title 18, Sec. 338.*
2. Criminal Code Sec. 37 which sets forth the crime of conspiracy to commit an offense against the United States, *U. S. Code Title 18, Sec. 88.*

## IV

**Summary Statement of Matter Involved****Mass Prosecution**

This was a case of mass prosecution. The appellant, Joseph Cohen, as one of seventy-five defendants, charged in a thirty count indictment with violating the mail fraud and conspiracy statutes, was convicted after *seven months' trial*, before Porterie, J. He was sentenced to two consecutive terms, five years on one substantive count and two years on the conspiracy count, totaling seven years of imprisonment, and a \$5,000 fine.

**The Indictment**

The indictment<sup>1</sup> found September 30th, 1938, in the nature of a "catchall", charged (in 29 counts, differing only in the count letters) a *single* scheme alleged to have involved the perpetrating and indulging in forty-three types of activity, one of which was the making of forty-one different types of listed misrepresentations; and a conspiracy count (#30) listing twenty-nine overt acts, five of them (1, 2, 3, 4 and 29) dated more than three years before the indictment.

---

<sup>1</sup> The indictment, 62 pages in length, is confused and sweeping, practically defying analysis. In brief compass, there is charged the fraudulent sale of (a) stock in five separately named, unaffiliated corporations; (b) land, and interests in oil and gas lands, all differently described, in five different states, and elsewhere; (c) participation trust certificates of an independent corporation; and as part of the conspiracy that (a) six corporations were to be formed; (b) eleven royalty trusts were to be organized; (c) forty-one sets of false representations were to be uttered; and (d) that the defendants (without specifying which) would maintain twenty-three different corporate or trade names in thirty-six locations in Boston and New York.

### The Trial

There were over 16,000 pages of testimony; more than 4,000 documentary exhibits.

The trial commenced August 4th, 1941. It was concluded March 8th, 1942.

Though *one* large conspiracy of all seventy-five defendants was charged, involving all the corporations and securities listed, there was evidence instead, as to some *five hundred episodes*, in numerous separate, unconnected schemes, aggregating over *two hundred conspiracies*, and so defined in the opinion below:

"The prosecution put in evidence of more than 200 separate fraudulent transactions with customers; each of these was a 'scheme' each was a 'conspiracy',  
 • • •" (op. Hand, J. p. 2248)

The combinations of defendants (none more than five—the majority less than three), involved in the separate frauds, were as varied as there were alleged victims (about 100 named in the indictment and about 200 named at the trial). Yet, all of this evidence was admitted as part of the offense charged (*there being no proof of any single scheme involving all defendants*), and in each case, despite persistent vigorous objection, all the evidence was held as binding upon all the defendants (R. 176-7, 248, 73, 4773, 12623), not on the theory of "similar offenses" (R. 560, *et seq.*) but to furnish "background" and "association".

Evidence, offered at the trial, included all conspiracies involving defendants (1) as to whom the government severed, (2) who had pleaded guilty and were not on trial, (3) who were on trial and coupled with persons *not named in the indictment*; (4) who were on trial with some who were not, and (5) in one case, even as to a defendant who

had successfully invoked the statute of limitations and procured dismissal of the indictment before trial.<sup>2</sup>

Proof of all these conspiracies, uniformly admitted over objection, *was held binding on all defendants.*

While it is physically impossible within the permissible limits of this petition to furnish the material facts, even in skeleton form, enough may be suggested for this Court to realize, from this gargantuan record, that the confusion and multiplicity of issues were bound to produce irreparable prejudice to the host of defendants, tried *en masse* for a mail fraud conspiracy—and that in the maze of it all, an individual defendant was quite helpless to protect himself from the sinister inroads of the accusatory testimony leveled at others, and yet ruled binding as to him.<sup>3</sup> The Court refused to limit the testimony in any respect (R. 712), deeming the conspiracy count as a barrier to any differentiation with regard to the defendants as a group. The Court declared that whether the case would continue for "eight weeks or a lifetime" (R. 738,9)—the accumulation of evidence, binding on all defendants, would continue to be received. Such a grotesque proceeding inevitably produced the result of forcing defendants to plead guilty because of the danger, the expense and the utter futility of defense in such a protracted trial. No wonder that in the hope for leniency, half of the defendants who had the

<sup>2</sup> See *U. S. v. Ames*, 39 Fed. Sapp. 885 in which the defendant, Benjamin Finn's plea in abatement was sustained on the basis of the Statute of Limitations. Notwithstanding this, the transactions in which he was allegedly involved with one Klimm (R. 3666-3729) were nevertheless presented at the trial by the prosecutor, and by the ruling of the court made binding upon all the defendants, including appellant, Cohen. These constituted four schemes to defraud, all in Massachusetts, beyond the jurisdiction of the District Court.

<sup>3</sup> The Court, by agreement with counsel, ruled that all objections and exceptions taken, should inure to the benefit of each defendant—this to apply throughout the trial.

*temerity* to proceed to trial had pleaded guilty or *nolo contendere* long before the trial was over.

Despite this mountain of proof, further evidence was allowed as to (1) transactions antedating 1932, the date alleged as the genesis of the conspiracy, and (2) allegedly fraudulent transactions involving securities and alleged victims not even mentioned in the indictment; and though the defendants had been denied a bill of particulars, timely sought, this additional mass of confused and chaotic matter was held binding on all defendants.

Prior pleas of guilty, and some severances moved by the Government, left twenty-seven defendants at the opening of the trial, of whom, as before stated, thirteen defendants in the course of the trial pleaded either guilty or *nolo contendere*.

### **Some Basic Errors at the Trial**

The Court declined a severance and a denial of motions for mistrial on frequent occasions of grave prejudice. Incompetent and hearsay evidence was received binding on all defendants and relating to a mass of confused and chaotic data as to five hundred transactions in respect to all of which but a handful, the appellant Cohen, was not involved or even mentioned. The Court made erroneous rulings on jurisdictional matters and in the defining of the crimes charged.

The Court made an inadequate charge, shot through with error, and declined all requests to charge.

The jury was instructed to determine whether there was evidence to support any *one* of the forty-one representations with regard to the substantive counts, or any *one* of the twenty-nine overt acts as to the conspiracy count. The Court refused to withdraw from the jury's consideration a

*single* representation or overt act despite the fact that many of them were concededly not proved, and some were barred by the Statute of Limitations; but ruled, and so charged, that proof of a *single* representation or of a *single* overt act was sufficient in law to support a verdict of guilt as to any *one* of the defendants.

Thus the jury was permitted to base a verdict of guilty on an unproved or immaterial representation or upon an unproved or outlawed overt act.

Of the thirteen defendants, at the finish, eleven were convicted, two acquitted. At the close of the case on the government's motion, the following counts were dismissed: nos. 10, 11, 12, 16, 17 and 29.

None of the defendants were convicted on counts 3, 8, 13, 14, 15, 21, 24, 26 and 28.

### **The Conviction and Sentence**

The appellant Cohen was convicted on counts 1, 4, 22, 23, 27, 30—the only counts in connection with which his name was mentioned. He was sentenced to a term of imprisonment for five years on Count 1, two years and a \$5,000 fine on Count 30 (conspiracy), the prison terms to run consecutively. Imposition of sentence on Counts 4, 22, 23 and 27 were suspended with a three year probationary period at the end of the prison term.<sup>4</sup>

---

<sup>4</sup> It is significant to note that despite L. Hand, J.'s observation in the opinion below that the "verdict gives internal evidence of careful discrimination" (op., p. 2251), the fact is that the verdict shows quite the contrary. It is demonstrable that the verdict of the jury was based not on any theory of conspiracy; but defendants were convicted in connection with counts as to which their names were mentioned. As to fifteen counts, there was no conviction (six having been withdrawn by the government, and the jury having acquitted on nine). As to only six counts was more than one defendant convicted, and in groupings of two and three—and on eight counts, one defendant each.

### The Questions Presented <sup>5</sup>

1. Whether this *seven months' mass trial* was, as to the appellant, Joseph Cohen, fair and impartial, as guaranteed by the Constitution.

2. Whether the variance between indictment and proof was substantial and material, and worked practical prejudice to the appellant.

3. Whether there was a misjoinder of defendants.

4. Whether there was a misjoinder of offenses.

5. Whether there was reversible error:

(a) in the admission of evidence as to some two hundred unconnected and unrelated conspiracies, when only a *single* conspiracy was alleged in the indictment; and

(b) in the admission of evidence as to some five hundred transactions, in the main, wholly unconnected with appellant, Cohen, yet held to be binding upon him, as well as upon all the defendants, for the purpose of showing "association" and "background".

6. Whether there was reversible error in assuming that there was authority for this type of joint trial by applica-

<sup>5</sup> A large variety of important questions of law are necessarily presented by this excessively long and intricate record. In listing some of these for the court's examination, stress is laid upon the imposing difficulties with which a defendant is confronted, in formulating a schedule of errors, for appellate perusal, in a case of mass prosecution such as this. In selecting, from the vast reaches of the record, the multitudinous grounds of prejudicial error that are inescapably bound to develop, there is a wilderness of data to be ploughed over and reduced to extracts—a prodigious task, taxing the ingenuity of counsel, in their earnest effort to be of aid in presenting all essential items within the confines of a readable brief. While the problems are many and varied, none is deemed unimportant, and all, it is believed, constitute substantial and reversible error.

tion of the doctrine of immaterial variance, stated in *Berger v. U. S.*, 295 U. S. 78.

7. Whether there was reversible error in denying a severance, to appellant Cohen, forcing him to be tried on a number of schemes, and not upon the *single* scheme alleged in the indictment, and denying such applications at the beginning, during, and at the end of the trial.

8. Whether there was reversible error:

(a) in the charge of the trial judge for inadequacy and error;

(b) in the rejection by the trial court of all requests to charge; and

(c) in the statements by the Court to the jury during the trial and in the Court's charge, and never specifically clarified or corrected, to the effect that the defendants were to be adjudged guilty if they were found to have entered into or become parties to a scheme to defraud—which instructions were not coupled with (1) the gist of the offense, namely, proof of the use of the mails in pursuance thereof, —or (2) the doing of an overt act.

9. Whether there was reversible error by the trial court in holding that there was evidence of the mailing of the Count I letter when the only proof in support of such finding was merely the uncertain self-contradictory *opinion* of a witness.

10. Whether there was reversible error in admitting in evidence, as binding upon all of the defendants, including the appellant, Cohen, the opinion of the Circuit Court of Appeals (10th Cir.) in the unrelated mail fraud case of *Rosenberg v. U. S.*, 120 F. (2) 1935, and the reading of that entire opinion *verbatim* to the jury.

11. Whether there was reversible error:

(a) in the refusal of the trial court to withdraw from the jury's consideration, *any one* of the forty-one representations alleged in the substantive counts, although concededly some were not proved; and

(b) in instructing the jury that a verdict of guilt on the substantive counts could be based on *any one* of the forty-one representations alleged in the indictment, despite the immateriality of some, and the lack of proof of others.

12. Whether there was reversible error:

(a) in the trial court's refusal to withdraw from the jury's consideration *any one* of the twenty-nine overt acts alleged in the conspiracy count, although concededly some were not proved, and five of them were barred by the Statute of Limitations; and

(b) in instructing the jury that a verdict of guilt on the conspiracy count could be based on *any one* overt act, *not excluding* those not proven, nor the five overt acts laid before September 30th, 1935, three years before the indictment, and which overt acts, Nos. 1, 2, 3, 4 and 29 were all therefore barred by the Statute of Limitations.

13. Whether the trial court committed reversible error in sustaining, and even commending, the mode of interrogation adopted by the prosecutor in cross examination of appellant, Cohen, by which he imputed, by the affirmations in his questions, criminal convictions to the employees of the appellant.

14. Whether there was reversible error in sustaining the conviction of appellant Cohen as to Count I, based solely upon the uncorroborated testimony of the malicious and wholly disreputable accomplice Mussman who was

"admittedly concerned with making a case against the accused"<sup>6</sup> and whether or not, in view of the other surrounding prejudicial error, such conviction should have been set aside for reasons similar to that which produced the reversal in *Berger v. U. S.*, 295 U. S. 78.

15. Whether there was reversible error in the refusal of the trial court to declare a mistrial because of the malicious deportment of the witness Mussman, and the atmosphere of passion and prejudice he studiously developed against the defendants, including the appellant and his counsel; and the attitude of the trial court in relation to Mussman's entire course of conduct.

16. Whether there was reversible error in the failure to direct a verdict for the appellant Joseph Cohen on Count I, since his purported participation in the scheme involved therein (the Anderson transaction) had definitely terminated in May, 1935; and the "count" letter, purportedly mailed subsequent to its termination, to wit, on October 4, 1935, was (as admitted by the prosecutor in his summation)

---

<sup>6</sup> The witness Mussman was thus described by L. Hand, J. in the opinion in the court below, the court stating that he was

" \* \* \* a confessed unblushing rogue, *admittedly concerned with making a case against the accused*, partly in the hope of lenity for himself, partly apparently from malice." (op. p. 2257)

"*He was, on his own admission, an altogether abandoned character, frank to confess a long career of cheating and fraud; seeking to secure lenity by his testimony and hostile to the accused.*" (p. 2247) (Emphasis supplied)

This turbulent vindictive witness who testified for about six weeks, with practically no rebuke or restraint (despite his venom and violent outbursts), and not without the aid of some solicitude from the court, did, as the record will show, with deliberation, pollute the atmosphere of the trial. His tirades, malicious epithets and attacks upon the appellant and appellant's trial counsel, constituted a studied and calculated effort not only to poison the jury against appellant, but also to destroy the effectiveness of his lawyer.

at a time when what occurred constituted "independent transactions."

17. Whether the Court of Appeals erred in ruling that Section 557 of Title 18, U. S. Code permits the joinder of crimes, when the accused are different.

18. Whether the trial court erred:

(a) in deliberately receiving hearsay, as proper evidence, and ruling that the truthfulness of conversations contained therein, was for the jury to determine;

(b) in receiving in evidence, as binding on all other defendants, every statement or act of an alleged conspirator, irrespective of whether it was in furtherance of the conspiracy, and without independent competent evidence of the connection of the other defendants with the scheme;

(c) in permitting in evidence the declarations of one conspirator to another, as competent evidence to establish the connection of a third person (the appellant Cohen) with the conspiracy;

(d) in restricting and destroying the value of cross examination of government witnesses as to their prior testimony, by requiring (1) reference to the stenographic transcript, and (2) confronting the witness beforehand with the testimony already given; and

(e) in admitting evidence as to facts occurring subsequent to the date of the indictment, for three years and three months thereafter, and up to January 1, 1942.

19. Whether the Court of Appeals erred in holding that the Statute of Limitations is not a bar to a conspiracy in which the last overt act found was more than the statutory period prior to the indictment.

20. Whether the Court of Appeals erred in holding that appellate review need be no more exacting in criminal than

in civil cases and that evidence "sufficient to support a civil verdict will support a criminal one".

21. Whether the Court of Appeals erred in ruling that in a conspiracy case a defendant must, if need be, run the risk of an unfair trial.

22. Whether the Circuit Court of Appeals erred in upholding the verdict, considering the unusual character of this case, despite the *cumulative* sentences on the substantive and conspiracy counts, although in essence this imposed double punishment upon appellant for the same crime. (*Amendola v. U. S.*, 17 F. (2) 529)

23. Whether it was reversible error for the trial court to permit to the prosecutor a private *ex parte* argument on defendant's motion to inspect papers in the government's possession, and to exclude the defendants and their counsel from such argument—in violation of the fundamental constitutional rights of the accused to be present in person, or by counsel, throughout every phase of the trial.

24. Whether the Court of Appeals erred in ruling that all other errors, urged by appellant, not specifically discussed in the opinion, were not reversible.

25. Whether the Circuit Court of Appeals erred in failing to appraise the errors and the prejudicial conduct in the course of the trial in the aggregate as reversible, even though individually, and in the absence of concomitant errors, they might not have been sufficiently prejudicial to have justified a mistrial, or to require a new trial.

## VI

### Reasons for Allowance of Writ

In the opinion below (L. Hand J.), it is pointed out that there were propositions of federal law on fundamental questions, pertinent to its decision, as to which there is

diversity in the circuits. These are urged as the basis for *certiorari* (Rule 38, 5b).

The following additional special and important reasons are submitted: (a) Important questions of federal law, as will hereinafter appear, have been decided in a way probably in conflict with applicable decisions of the Supreme Court, and; (b) The Court below has so far sanctioned a departure by the United States District Court for the Southern District of New York, from the accepted and usual course of judicial proceedings, specified *infra*, as to call for an exercise of the power of supervision by the Supreme Court:

I. The Court of Appeals has erred in its failure to appraise the inequity of this most extraordinary criminal trial—which is *sui generis* for its length and complexity—and the injustice wrought by this mass prosecution in depriving the defendants of a fair, speedy and impartial hearing as guaranteed by the Federal Constitution, since in such giant prosecution, it is inevitable for the accused to be buried under an avalanche of grave prejudicial error.

II. The Court of Appeals held that Sec. 557 of Title 18, U. S. Code, permits the joinder of crimes when the accused are different; referring in its opinion to the following diversity in the circuits (op. p. 2252) citing, in support of its position:

Second Circuit:

*U. S. v. 20th Century Bus Operators*, 101 F. (2) 700.

Seventh Circuit:

*U. S. v. Tuffanelli* 131 F. (2) 890, 893, 894 opinion by a divided court (Major, J. dissenting on authority of *McElroy v. U. S.*, 164 U. S. 76.)

and the following case, *contra*:

Eighth Circuit:

*Coco v. U. S.*, 289 F. 33.

III. The Court of Appeals held that the Statute of Limitations is not a bar to a conspiracy in which the last overt act found was more than the statutory period prior to the indictment; referring in its opinion to the following cases, (op. p. 2263) as contrary to its position:

Eighth Circuit:

*Ware v. U. S.* 154 F. 577;

*Culp v. U. S.* 131 F. (2) 93, 100;

*Lonabaugh v. U. S.* 179 F. 476;

*McWhorter v. U. S.* 299 F. 780.

Ninth Circuit:

*Jones v. U. S.* 162 F. 417, 425;

*Hedderly v. U. S.* 193 F. 561, 569.

Court of Appeals of the District:

*Lorenz v. U. S.* 24 App. D. C. 337, 87.

U. S. Supreme Court:

*Brown v. Elliott* 225 U. S. 392.

The Second Circuit holds squarely against this body of authority, and asserts, in doing so, (despite *Brown v. Elliott*, 225 U. S. 392, 401 where *Lonabaugh v. U. S.* 179 F. 476 is quoted with approval) that its decision is based upon its concept of *Kissel v. U. S.*, 218 U. S. 601 (which it recognizes to be not a conspiracy case), as one not interpretable "in any other sense than as contrary to such a notion." (Op. p. 2263).

#### IV. The Court of Appeals erred in holding

(a) that evidence "sufficient to support a civil verdict will support a criminal one" (op. p. 2245);

(b) that it is wrong to "assume that an appellate court, before affirming a verdict in a criminal case, will demand that the evidence shall be more cogent and persuasive than when reviewing a civil verdict" (op. p. 2245) and

(c) that it does not accept the proposition of law that "an appellate court will more straitly scrutinize the evidence necessary to sustain the verdict" (op. p. 2245).

The Court of Appeals, admitting that "*there is indeed authority for that position but it is not the law as we understand it*", relies on two prior decisions of the Second Circuit (both rendered by L. Hand, J.) to sustain its position with regard to appellate review, *Feinberg v. U. S.*, (2nd Cir.), 140 F. (2) 592; *U. S. v. Andolschek*, 142 F. (2) 503.

This pronouncement by the Court below is deemed in conflict with applicable decisions of the Supreme Court.

V. The Court of Appeals erred in approving the rejection by the trial court of every one of the requests to charge, sustaining the brief charge of the trial judge as adequate, despite its brevity, confusion, inaccuracies, contradictions and fundamental omissions, but pointing out "It is true that in many jurisdictions such requests are taken more seriously than we take them" (op. p. 2262).

This ruling is in apparent conflict with the applicable decisions of the Supreme Court. See *Thorwegan v. King*, 111 U. S. 549.

Cf. *Bruno v. U. S.*, 308 U. S. 287, 92 (1939).

VI. The Court of Appeals, Second Circuit, by its attitude toward the "harmless error doctrine"<sup>7</sup> evidences not only

<sup>7</sup> See *U. S. v. Liss*, 137 F. (2) 995 and the discussion by Jerome Frank, J. in the dissenting opinion at p. 1001.

difference with the other Circuits, but is in apparent conflict with the applicable view of the Supreme Court in *McCandless v. U. S.*, 298 U. S. 342; and in the light of its employment of the "harmless error doctrine", erred in adjudging as not reversible, important, substantial and prejudicial errors, urged by appellant.

VII. The Court of Appeals erred in ruling that there was no material variance between the indictment and proof, and despite the variety of conspiracies, holding that there was no misjoinder or practical prejudice to the appellant, under the doctrine of *Berger v. U. S.*, 295 U. S. 78<sup>8</sup>—thus expanding the doctrine of the *Berger* case into a grotesque distortion of what it purported to assert.

VIII. The Court of Appeals erred in ruling that since, as a practical alternative, persons charged with conspiracy must either be subjected to a joint prosecution, and thereby suffer the possibility of an unfair trial or, on the other hand obtain immunity, the accused cannot expect immunity but must accept that risk, including the danger of an unfair trial.

This doctrine, we submit, is violative of the spirit and letter of the Constitutional guarantee of a fair and impartial trial. A forthright expression of opinion on this basic principle is needed, lest the views of the Second Circuit, in this regard, become the basis of an unsavory precedent in the pursuit of mass prosecution.

IX. The Court of Appeals erred in failing to hold as reversible error, as to appellant Cohen, the receipt in evidence, and the reading *verbatim* to the jury of the legal

<sup>8</sup> It is believed that just as in *U. S. v. Mitchell*, 322 U. S. 65 where the Supreme Court granted *certiorari* "in view of the importance to federal criminal justice of proper application of the *McNabb* doctrine", so in the instant case the Supreme Court should in the public interest grant *certiorari* in view of the importance to federal criminal justice of proper application of the *Berger* doctrine.

opinion of the Circuit Court of Appeals (10th Cir.) in the wholly unrelated mail fraud trial respecting the conviction therein of the co-defendant, Joel Rosenberg for a similar type of mail fraud, and which was reversed on appeal. (*Rosenberg v. U. S.* (10th Cir.), 120 F. (2) 935.)

X. The Circuit Court of Appeals erred in holding as non-reversible error (although concededly "improper"), the mode of interrogation adopted by the prosecutor in cross examination of appellant (and approved by the trial judge), by which he imputed by the affirmations in his questions, criminal convictions to the employees of the appellant.

XI. The Circuit Court of Appeals erred in failing to hold, as jurisdictionally fatal, and as reversible error, the ruling of the trial court, in violation of the fundamental constitutional rights of the accused, permitting to the prosecutor a private *ex parte* argument on defendant's motion to inspect papers in the government's possession, and excluding the defendants and their counsel from such argument—thus denying to the accused the basic right to be present in person, or by counsel, through every phase of the trial.

XII. The Court of Appeals erred in failing to rule that the conviction of appellant on Count I, based merely on the uncertain, self-contradictory opinion of a witness, as to mailing in the Southern District of New York, (there being no envelope) was erroneous because of the inadequate evidence as a matter of law. The lack of proof was jurisdictionally fatal since proof beyond a reasonable doubt as to the mailing in the district was the *sine qua non* for a verdict of guilt.

XIII. The Court of Appeals erred in failing to determine as reversible, the following errors of the trial court

(which were urged as substantial in the court below, but which were not discussed in the opinion):

(a) in deliberately receiving hearsay, as proper evidence, and ruling that the truthfulness of conversations contained therein was for the jury to determine;

(b) in receiving in evidence, as binding on all other defendants, every statement or act of an alleged conspirator, irrespective of whether it was in furtherance of the conspiracy, and without independent competent evidence of the connection of the other defendants with the scheme;

(c) in permitting in evidence the declarations of one conspirator to another, as competent evidence to establish the connection of a third person (the appellant Cohen) with the conspiracy;

(d) in restricting and destroying the value of cross examination of government witnesses as to their prior testimony, by requiring (1) reference to the stenographic transcript, and (2) confronting the witness beforehand with the testimony already given; and

(e) in admitting evidence as to facts occurring subsequent to the date of the indictment, for three years and three months thereafter, and up to January 1, 1942.

## VII

### Conclusion

WHEREFORE, your petitioner prays that a *writ of certiorari* issue to the United States Circuit Court of Appeals for the Second Circuit, to the end that this cause may be reviewed, and that the judgment of said Circuit Court of

Appeals be reversed, and the petitioner be granted such other and further relief as may be proper.

Dated, New York, N. Y., November 7th, 1944.

JOSEPH COHEN,

*Petitioner,*

By WALTER BROWER,

*Counsel for Petitioner.*

ILLO ORLEANS,

COLEMAN GANGEL,

*Of Counsel.*

